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Damned if You Do, Damned if You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win

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DAMNED IF YOU DO, DAMNED IF YOU DON'T: WHY MULTI-COURT- INVOLVED BATTERED MOTHERS JUST CAN'T WIN

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INTRODUCTION

Being a good mother is difficult. Being a good mother and a victim¹ of domestic violence² is even harder. The different and often competing expectations placed on battered mothers in the juvenile (child welfare),³

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1. For consistency, I refer to persons subjected to domestic violence as “victims.” There are other terms I could have used, including “survivor,” “battered woman,” etc. I am not convinced that any term is completely adequate.

2. The term “domestic violence” is also problematic as abuse can take many different forms, including emotional, financial, and sexual.

3. When I refer to child welfare proceedings, I refer to the proceedings against parents by the state child welfare agency. In many states, these proceedings occur in the state juvenile court. In other states, however, these same proceedings occur within the family court, or low-level trial court system. For this Article, I use the term juvenile court to describe the court where the child welfare proceedings take place.

civil/trial,⁴ criminal, and family⁵ court systems present a profound and befuddling problem. In this Article, I intend to identify the difficulty and uniqueness of being both a mother⁶ and a victim of domestic violence, investigate the tension and conflict among different judicial systems, and proffer some suggestions for reform.

Battered mothers often find themselves caught between the competing demands of the juvenile, civil, criminal and family court systems. In some states, jurisdiction may be concurrently vested in more than one court—generally, family and district, or district and juvenile. In other states, all courts are independent. And in other states, child welfare proceedings are heard in family court. Regardless of the details, in each state there are several court systems that affect battered mothers. Mothers who are concurrently involved in multiple court systems inevitably experience the differing expectations placed on them by different courts. “Failure to protect” laws are “child-centered,” whereas domestic violence laws tend to be “victim-centered.” While the intent behind each set of laws is protection, there may be imperfections in the way the laws were drafted and are applied.

Battered mothers are charged with abuse and neglect in the juvenile court at alarmingly high rates.⁷ Many states prosecute exposure to intimate partner violence as a type of child maltreatment, or “failure to protect.”⁸ Other states prosecute the same charge as a criminal charge in district court or another equivalent lower-level court. Charges are frequently brought against the victim of violence, often the mother and custodial parent, for failing to protect her children from the domestic abuse. In many cases, social workers and the courts place unrealistic expectations on a woman by requiring her to either obtain a protection order preventing contact with her abuser or to make a complete and immediate separation from her abuser. These expectations are potentially impossible for battered mothers to achieve because battered mothers are typically financially dependent on their abusers and lack a community support system. Such financial and

4. In this Article, I refer to the trial court as the lowest level of civil court in a given jurisdiction where a victim can seek a civil protection order.

5. In this Article, I refer to the family court as the court that hears cases involving custody and visitation. In some states, however, these same proceedings occur in probate court or a low-level trial court.

6. In the sections where I talk exclusively about mothers who are victims of domestic violence, I use the term “battered mothers.” Again, this terminology is not entirely satisfactory.

7. See Jeanne Fugate, *Who’s Failing Whom? A Critical Look at Failure to Protect Laws*, 76 N.Y.U. L. REV. 272, 273 (2001).

8. See, e.g., NAT’L CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFO., CHILDREN AND DOMESTIC VIOLENCE: SUMMARY OF STATE LAWS (2004), http://www.unified-solutions.org/Pubs/children_and_dv_summary_of_state_laws.pdf (outlining the applicable laws of Maine, Montana, Pennsylvania, and West Virginia).

support issues are a common effect of a relationship built on control and isolation. These expectations are dangerous and could have lasting and counterintuitive results.

Further, once the battered woman leaves her abuser or obtains a civil protection order⁹ against the abuser, the abuser is likely to file a family court case for visitation and/or custody. If the abuser is able to obtain such an order, he will be authorized by the court to have contact with his victim through their children, defeating any of her attempts to meet the expectations of the juvenile court. In general, family courts do not take the step of preventing any and all visitation by one of a child's parents.¹⁰ While current custody laws across the United States do take into account how domestic violence plays into shared orders of custody, very little is made explicit about contact and visitation.¹¹ Family courts are concerned about alienating one parent from the children and often give parents many chances to stay involved in their children's lives.¹² Thus, women who do everything asked of them by child protective services—that is to say, complete separation from their abusers—may then face opposing pressures and judgments in the family court.

Battered mothers who seek civil protection orders in the district court face expectations that are sometimes directly in conflict with those imposed both by the juvenile court in abuse and neglect proceedings and by the family court in custody matters. Battered mothers in civil protection order proceedings may obtain temporary custody of their children on an ex-parte basis. While there is a hierarchy in the relative power of the different judicial systems—thus an order from the family court supersedes an order from juvenile or district court—the conflicts in the expectations, possibilities, and messages conveyed by the three types of courts are profound. For example, an order from a juvenile court could very possibly require a mother to isolate herself and her children completely from a batterer, while at the same time a family court orders her to facilitate visitation between that abuser and her children. This can occur even when a district court concurrently grants a mother full custody of the children. In

9. Civil protection orders are also known as “restraining orders,” “orders of protection,” “civil protection orders,” or “protective orders.”

10. See, e.g., Mass. Law Reform Inst., *Child Custody and Visitation*, MASSLEGALHELP, <http://www.masslegalhelp.org/children-and-families/child-custody-and-visitation> (last visited Feb. 9, 2012) (outlining the possible non-court-imposed solutions to comply with visitation orders, while concurrently protecting the safety of the children and abused parent).

11. See, e.g., MISS. CODE ANN. § 93-5-24 (West 2003) (granting courts a wide array of options in tailoring visitation orders to situations in which domestic violence has occurred).

12. See, e.g., TEX. GOV'T CODE ANN. § 501.099 (West 2009) (instructing the Department of Corrections to pursue policies that “encourage family unity”).

addition, the district court may include a no-contact requirement between the mother and abuser, which will then be subsequently amended various times in different courts.

Are there ways to reform a system that results in this seemingly impossible and incoherent scenario? Why do these conflicts exist? What normative conflicts underlie the problem? In this Article, I seek to make concrete recommendations as well as proffer ideas for systemic change; for example, the attorneys appointed to represent battered mothers in juvenile court should be attorneys with specific experience and training in domestic violence and in different judicial venues within the same state. I then analyze the feasibility of coordination among the different court systems and whether and how information can be shared without violating confidentiality.

VIGNETTE 1

In 2008, I represented a woman in the Massachusetts Probate and Family Court. She was living in a shelter with her infant daughter, and a year-long restraining order from the Massachusetts District Court was in effect against her ex-boyfriend (hereinafter “the respondent”), the father of her child. The respondent hired private counsel and filed a petition for full custody in probate court. I opposed the motion in writing and was prepared to argue vigorously against any such request. At the time the motion was filed, an open criminal investigation was proceeding against the respondent for potential sexual assault against the child, and the Department of Children and Families had issued a supported finding of abuse by the father against the child. There was no such finding against my client as she had cooperated fully with the Department of Children and Families by seeking and obtaining both safe shelter and a restraining order. I successfully opposed that first motion in court. The respondent, however, would not back down. His attorney proceeded to make a series of requests and motions to the court, including a request for an appointment of a Guardian ad Litem to evaluate the situation, a request for discovery, and an appeal to the Department of Children and Families to re-evaluate their initial finding against the respondent. In the meantime, the Department of Children and Families closed the case, as my client had effectively achieved the goal of safety; she was in housing, a restraining order was in place at the time, and the respondent did not have any visitation rights.

The respondent’s persistence worked. The next time we were in court, he was granted supervised visitation. The supervised visits eventually became unsupervised visits with drop offs and pickups at a local police station. The court appointed a Guardian ad Litem to do an evaluation of the case and parties. The Guardian had no experience in domestic

violence. She gave very little credit or space in her report to the reasons why my client opposed visitation by the respondent, my client's efforts on behalf of her child, or her willingness to work with all agencies and evaluators appointed to the case. The Guardian's final report was turned in the morning of our hearing, during which the respondent requested overnight visits. The report barely mentioned the respondent's abuse of my client and failed to credit the finding by the Massachusetts Department of Children and Families of abuse against the child.

I opposed the report being admitted into evidence based on the fact that I had not had time to properly review the materials. My request was denied and the judge ordered us to immediately begin our oral arguments for and against overnight visitation. I believe I began as follows: "Your honor, Margo Lindauer, staff attorney at a certain domestic violence agency in Boston on behalf of Ms. X. As you are aware from previous hearings, my client is a victim of domestic violence by the respondent and the request . . ." Before I could continue speaking, the judge bellowed: "Counsel, if I hear you say the words 'domestic violence' one more time in my court room, I will throw you out."

How was I to continue my argument as to why forced interaction between the two parties to facilitate overnight visits would not only require verbal and physical contact with her abuser, but would also be in direct violation of a restraining order already in place, and would endanger my client's daughter? "*Domestic violence*" was at the heart of the proceeding. Furthermore, it was our contention—with the support of the Department of Children and Families—that the respondent, like many abusers, had also abused the child.

This snapshot into a moment of litigation highlights the litany of issues and conflicts that are not resolved in our present system. How could a woman who did everything asked of her by child protective services be deprived of her voice in a family court? In the instant case, she fled her home in the middle of the night with her baby and went into a shelter in a city that she did not know and where she did not speak the language. She engaged with the social worker appointed to her case, worked with the district attorney, immediately applied for both temporary and year-long restraining orders, engaged with our legal team, and cooperated with the Guardian ad Litem appointed to her family court case. How could she lose in the end? How could a court *not* want to hear about the domestic violence? How could we reopen the abuse and neglect case? How could there be such overt contradictions among the findings of three courts within the same jurisdiction? How could three courts focused on the same family say things directly in conflict? How could my client be the ideal parent in an abuse and neglect proceeding but be perceived as obstinate and alienating in a probate court matter? How could one court find that the

abuse alleged in her restraining order petition be so severe that there was no question but to issue a year-long restraining order preventing any interaction, but another court roll its eyes when the aforementioned abuse was brought up? How could this happen?

VIGNETTE 2

Imagine you are a young mother sharing a home with your partner and your two young children, ages 1 and 3. Imagine now that your mother, a middle-aged woman, has had a lifelong struggle with substance abuse and has just been released from a court-mandated inpatient treatment center after being charged with drug possession. Your mother had nowhere to go upon her release and you allowed her to move into your home on a temporary basis while she got back on her feet. You did not give her a key, however, and she was unable to be in the home unless you or your partner was there to supervise. Imagine now that you suspect that your mother is using again as her behavior has become increasingly erratic and she is easily angered.

One day, your mother knocks on the door and your partner is allegedly slow to answer as she has been awoken from a nap. Your mother is incensed by the time she enters the home and starts screaming at your partner (you are not home). She is so mad that she takes a broom, breaks it in half, and swings it at your partner's face, narrowly missing. Your partner is so frightened by the incident that she grabs the two children who are asleep in their room and runs outside to hide in her aunt's car while the police are called. The police arrive but your mother has fled the scene. The police take a report and you later return from work to hear about the drama that has ensued. The next day, you receive a call from Child Protective Services who want to speak with you and visit your home. You are scared of what happened, scared of what your mother could do to your partner, scared of where your mother is and what she is doing and scared that you may lose your children. What do you do?

THREE SYSTEMS THAT AFFECT BATTERED MOTHERS

Mothers are affected by intimate partner violence at much higher rates than fathers.¹³ While some argue that the tension battered mothers face is not gendered, the research proves that it is.¹⁴ The controversy related to

13. Michael P. Johnson & Janel M. Leone, *The Differential Effects of Intimate Terrorism and Situational Couple Violence: Findings from the National Violence Against Women Survey*, 26 PENN ST. J. FAM. ISSUES 322 (2005).

14. See NAT'L NETWORK TO END DOMESTIC VIOLENCE, INTIMATE PARTNER VIOLENCE AND GENDER, <http://www.ncdsv.org/images/Intimate%20Partner%20Violence%20and%20Gender.pdf> (last visited May 30, 2012).

“gender symmetry” and whether women perpetrate violence against their male partners as frequently as men do has largely been put to rest by the research of M.P. Johnson. As shown by Johnson and others, the gender symmetry debate can be resolved by distinguishing between intimate terrorism and situational couple violence.¹⁵ In intimate terrorist relationships, the perpetrator engages in an intentional pattern of coercion and control over his partner in areas such as finances, social contacts, intimacy, employment, and parenting practices, and uses violence as one means to that end. “Nonviolent control tactics become violent through their implicit connection with potential physical harm.”¹⁶ Research reveals far higher rates of male perpetrated intimate partner terrorism on their female partners than female on male.¹⁷ Thus, mothers are much more likely to be the victims of intimate terrorism than fathers.

Further, research suggests that there are many ways mothering and parenting decisions can be the focus of a batterer’s treatment of his victim.¹⁸ In fact, in many cases, the most basic and fundamental decision to become, or not become, a mother has been controlled by men.¹⁹ A batterer can exert control over his victim by attacking the mother-child relationship in any of a variety of ways, from directly attacking the child to making the victim incapable of fulfilling her duties as a caregiver by, for example, withholding financial resources. In this way, men’s violence has a “double level of intentionality,” in that attacks on a child can, in effect, be attacks on the mother.²⁰ What Johnson coins “intimate partner terrorism” is exactly the type of intimate partner violence that leads battered mothers to be exposed to the court system: “a planned pattern of coercive control that may involve physical, sexual or psychological abuse rising to the level of torture as understood in human rights discourse.”²¹

Situational couple violence, on the other hand, is violence that is not connected to patterns of control and coercion.²² Situational couple violence stems from specific arguments that in some instances escalate to violence, but show no relationship-wide evidence or connection to controlling one’s

15. See Johnson & Leone, *supra* note 13, at 323.

16. See *id.* at 324.

17. See *id.* at 323.

18. See Simon Lapierre, *More Responsibilities, Less Control: Understanding the Challenges and Difficulties Involved in Mothering in the Context of Domestic Violence*, 40 BRIT. J. SOC. WORK 1434, 1436-37, 1440, 1442 (2009).

19. See *id.*

20. Lapierre, *supra* note 18, at 1446.

21. Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN’S L.J. 217, 218 (2003) [hereinafter Buel, *Effective Assistance of Counsel*].

22. See Johnson & Leone, *supra* note 13, at 324.

partner.²³ Studies show fairly equal rates of male on female and female on male situational violence.²⁴

In addition to suffering from actual violence and dealing with the effects of the abuse on their children, battered mothers have limited access to legal resolutions for these harms.

[P]artly because [the harms suffered by women in this culture] are different [from those suffered by men], they often do not ‘trigger’ legal relief in the way that harms felt by men alone or by men and women equally do. As a result women are doubly injured: first by the harm-causing event itself, and second by the peculiarity or nonexistence of the law’s response to those harms.²⁵

Battered mothers are charged with abuse and neglect at alarmingly high rates.²⁶ Abuse and neglect are civil child maltreatment charges that are broadly interpreted in the juvenile court.²⁷ Some states hear their abuse and neglect cases in probate or family court.²⁸ “Failure to protect” is an allegation used in neglect proceedings against parents who fail to “protect” their child or children from some named harm. The harm in question is not a static concept, however. The ways in which the “failure to protect” doctrine is construed, applied, and worded varies state to state.²⁹ Failing to provide recommended medical care, for instance, can be considered a form of neglect in certain states.

Other forms of neglect include but are not limited to: physical neglect, emotional neglect, inadequate supervision, environmental neglect, and educational neglect.³⁰ Failing to protect your child from child abuse is another type of harm often included in an allegation.³¹ States define “failing to protect” differently, but language like “negligence,” “endangerment,” “abandonment,” and “condoning of abuse” are common terminology that run throughout the statutes.³²

23. *See id.*

24. *See id.*

25. ROBIN WEST, CARING FOR JUSTICE 96 (1997).

26. *See Fugate, supra* note 7, at 273.

27. *See* Chris Gottlieb, *Reflections on Judging Mothering*, 39 U. BAL. L. REV. 371, 378 (2010) (claiming that these actors often require parents to meet subjective standards seemingly impossible to meet in many instances).

28. *See, e.g., Divisions of Superior Court*, STATE OF CONNECTICUT JUDICIAL BRANCH, <http://www.jud.ct.gov/external/super/divisions.htm> (last visited May 30, 2012); *New York City Courts*, NEW YORK STATE UNIFIED COURT SYSTEM, <http://www.nycourts.gov/courts/nyc/index.shtml> (last updated Aug. 2, 2006).

29. *See, e.g., DIANE DEPANFILIS, CHILD NEGLECT: A GUIDE FOR PREVENTION, ASSESSMENT AND INTERVENTION* 45 (2006), <http://www.childwelfare.gov/pubs/usermanuals/neglect/neglect.pdf>.

30. *See id.* at 12-14.

31. *See id.* at 45.

32. *See id.* at 12.

Civil child maltreatment statutes “trigger child protective services investigation and intervention, and the potential involvement of juvenile court” or its equivalent.³³ The primary goals when conducting such interventions are “remediation of parental or family problems identified as causing the maltreatment, preservation of the family unit when possible, and planning for the long-term safety and stability of the child.”³⁴ However, a sustained abuse and neglect charge can result in the removal of the child and persistent involvement with the juvenile court and child protective services. Child abuse and neglect allegations that lead to a child’s removal include reference to spousal abuse in approximately one third of cases.³⁵

Many states use exposure to intimate partner violence as a type of neglect charge,³⁶ called “failure to protect.”³⁷ Charges are brought against the victim of violence, often the mother and custodial parent, for failing to protect her children from the domestic abuse.³⁸ In essence, the allegation charges the mother, who is also the victim of violence, for not preventing the violence or for “allowing” their child to be exposed to it.³⁹

It is undisputed that the implementation of policies related to neglect and abuse disproportionately affects mothers.⁴⁰ Criminal prosecution based upon failure-to-protect statutes, in particular, may carry the greatest potential for unfairly punishing mothers. “Most statutes fail to take into account the context within which a mother exercises her caretaking responsibilities. Mothers tried under these statutes are convicted if their attempts to protect their children are ineffective, or if fear for their safety or their children’s safety effectively prevents intervention.”⁴¹ In addition, studies confirm that the caretaking parent is more likely to be reported for child abuse.⁴² Mothers are more often than not the primary custodians of their children. Therefore, they tend to be the focus of and the named party

33. Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 20 (2001).

34. *Id.*

35. See Thomas D. Lyon, *Are Battered Women Bad Mothers? Rethinking the Termination of Abused Women’s Parental Rights for Failure to Protect*, in NEGLECTED CHILDREN: RESEARCH, PRACTICE, AND POLICY 237, 238 (Howard Dubowitz ed., 1999).

36. See Weithorn, *supra* note 33, at 19.

37. *Id.* at 29 n.107.

38. *Id.* at 32-33.

39. Fugate, *supra* note 7, at 294 n.98.

40. See, e.g., Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family and Criminal Law*, 83 CORNELL L. REV. 688, 718 (1998) (outlining the disproportionate prevalence of abuse claims against parents raising the children as opposed to the non-caretaking parent).

41. *Id.* at 720.

42. See *id.* at 718.

in neglect proceedings.⁴³

While mothers tend to be charged with neglect at higher rates and are “blamed” in the juvenile court, fathers in many instances remain immune from accountability.⁴⁴ Fathers, if paternity is established and/or their identities are known, are often named parties in neglect proceedings. However, these fathers rarely appear in court for the proceedings.⁴⁵ Despite being named parties, fathers’ lack of involvement in their children’s lives immunizes them from civil prosecution for neglect.⁴⁶ If fathers fail to appear at court and the government proceeds with a case for neglect, the case in chief becomes solely about the mother and her failings. Some have suggested that juvenile court be renamed “mother’s court,” “because of the absence of fathers from child welfare proceedings.”⁴⁷

Obtaining a restraining order is a judicial remedy offered to aid victims of domestic violence. Most states make the process pro-se friendly so that victims can access the system immediately without the help of an attorney. Frequently, child protective service workers tell mothers that they must obtain a restraining order or expose themselves to “failure to protect” charges.⁴⁸ In other instances, district attorneys tell mothers who are victims of violent offenses that they must testify against their batterer in order to obtain subsidized or public housing.⁴⁹ These requirements are problematic on many levels.

The procedure by which victims can access the judicial system and apply for an order varies state to state, but many states operate under a two-step process by which a victim applies for an order at a temporary or ex-parte phase: 1) a respondent (defendant) is served with the order, and 2) there is another hearing scheduled (usually 10-14 days out), where, if the victim can prove that she and the respondent meet the jurisdictional and relationship requirements, and that the alleged offense meets the state standard for intra-family violence, a judge will grant the order.⁵⁰ Each state determines the relief available to a victim in the restraining order, but there

43. *See id.*

44. *See id.* at 694, 715.

45. *See id.* at 709.

46. *Id.* at 710.

47. *See id.* at 709.

48. *See* Nancy K.D. Lemon, *The Legal System’s Response to Children Exposed to Domestic Violence*, 9 DOMESTIC VIOLENCE & CHILD. 67, 71 (1999) (noting that charges may be brought even when there is no physical harm by the mother or batterer).

49. *Victim of Domestic Violence Priority – Documentation Requirements*, NYC.GOV, <http://www.nyc.gov/html/nycha/downloads/pdf/vdv-documentation.pdf>.

50. STOP ABUSIVE AND VIOLENT ENVIRONMENTS, THE USE AND ABUSE OF DOMESTIC RESTRAINING ORDERS (2011), *available at* <http://www.saveservices.org/downloads/VAWA-Restraining-Orders>.

are consistencies across state lines; typical language involves a stay away provision that inhibits contact, abuse, and assault.⁵¹ Some states allow victims to seek civil remedies including vacate orders, temporary orders of child custody, and child support.⁵²

Battered mothers who seek civil protection orders in the district court face expectations that are different and apart from those imposed by the juvenile court in abuse and neglect proceedings and by the family court in custody matters. While there is a hierarchy in the relative power of the different judicial systems—an order from the family court supersedes an order from juvenile or district court—the differing expectations, possibilities, and messages conveyed are profound. In the case described above, where a mother seeks custody in the district court through a protection order, a respondent or father can then go to family court and petition for custody and visitation. The resulting order from family court will supersede the protection order as related to custody visitation and financial support of the minor children.

Family courts operate under different models than juvenile courts and district courts. Juvenile courts hearing child welfare cases focus solely on the best interests of the children, while district courts hearing protection order cases focus on violence prevention.⁵³ Family law, in contrast, is premised on the family and the ideal construction thereof. The presumption is of an arrangement that is almost non-existent today: a mother at home with minor children and a father working outside the home.⁵⁴ Family courts are based on family preservation and equality.⁵⁵

While it is clear that the above model does not describe most of the population utilizing family courts, antiquated notions and the idea of “equality” pervade. Family courts operate under a presumption of shared responsibility and family unity. A presumption of shared legal custody exists in family courts. In other words, courts assume that parents should share parenting responsibilities without a specific finding to the contrary.⁵⁶

51. Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J.L. & PUB. POL’Y 139, 146 (2010).

52. *See id.* at 147.

53. *Compare, e.g.*, N.J. STAT. ANN. § 2A:4A-21 (West 2011) (noting that the purpose of the juvenile system is “to provide for the care, protection, and wholesome mental and physical development of juveniles coming within the provisions of this act”), with N.J. STAT. ANN. § 2C:25-18 (West 2011) (declaring that the legislature’s goal in enacting domestic violence legislation was “to assure the victims of domestic violence the maximum protection from abuse the law can provide”).

54. *See* Murphy, *supra* note 40, at 688, 690.

55. *See, e.g.*, DEL. CODE ANN. tit. 10, § 902 (West 2011) (declaring in the statement of purpose that “preservation of the family as a unit [is] fundamental” and that the court will endeavor to provide control, care, and treatment *for each person* under its jurisdiction).

56. *See* Joan S. Meier, *A Historical Perspective On Parental Alienation Syndrome*

Studies confirm that the number of pro se family law litigants continues to increase every year.⁵⁷ Some studies report that nearly eighty percent of family law litigants that technically qualify as indigent and thus eligible for free legal assistance cannot obtain it.⁵⁸ Organizations that provide free legal services have suffered tremendously in the recent economic downturn. The Legal Services Corporation (“LSC”) is the “single largest funder of civil legal aid for low-income Americans in the nation.”⁵⁹ LSC-funded programs anticipate losing 1,226 full-time personnel between 2011 and 2012.⁶⁰ Low-income clients who are unable to afford counsel and unable to obtain civil legal services therefore appear in court without representation.⁶¹ Further, pro se litigants may be confused about what legal posture to take in custody and visitation matters because of their previous experiences with the juvenile court and/or the district court.

Batterers can use the family court system to publicly humiliate their victims and undermine their victim’s parenting skills.⁶² This public humiliation is another way batterers try to control their victims. “Many mothers view losing custody—especially to their abuser—as the worst thing that could happen to them.”⁶³ When abusers win a custody petition, “they have thereby succeeded in inflicting a profound injury on the mother.”⁶⁴ In the instant case, the injury is no longer physical, but it continues to be profoundly hurtful.

Fathers who file retributive custody and visitation petitions in family court often claim “parental alienation syndrome” and “parental alienation” with increasing frequency. Parental alienation syndrome (hereinafter referred to as PAS) is a syndrome based solely on one psychologist’s, Dr. Richard Gardner’s, analysis of his own clinical experience.⁶⁵ He described PAS as a syndrome “whereby vengeful mothers” use child abuse allegations to punish their ex-partners and in turn ensure that their exes do

And Parent Alienation, 6 J. CHILD CUSTODY 232, 244 (2009).

57. See, e.g., *Self-Representation Pro Se Statistics*, NAT’L CTR. FOR STATE COURTS (Sept. 26, 2006), <http://www.ncsconline.org/wc/publications/memos/prosestatmemo.htm>.

58. See, e.g., JANE C. MURPHY & ROBERT RUBINSON, *FAMILY MEDIATION: THEORY AND PRACTICE* 161 (2009).

59. *What is LSC?*, LSC.GOV, <http://www.lsc.gov/about/what-is-lsc> (last visited April 20, 2012).

60. *Staff Reductions Hit Legal Aid Programs*, LSC.GOV, <http://www.lsc.gov/media/press-releases/staff-reductions-hit-legal-aid-programs> (last visited April 20, 2012).

61. See *id.*

62. See Meier, *supra* note 56, at 234.

63. *Id.*

64. *Id.*

65. See *id.* at 235.

not receive custody.⁶⁶ Gardner's PAS is not an actual syndrome as it is not based on any scientific evidence or any empirical data, but rather is based on Gardner's own beliefs about relationships and sexuality.⁶⁷

A more recent development, "parental alienation," is a revised approach to PAS.⁶⁸ Parental alienation is not specifically directed at fathers who have allegedly been alienated from their children by "vengeful mothers." Parental alienation asserts that children can become alienated and estranged for many different reasons, not just mothers who have it out for the father of their children.⁶⁹ That being said, the differences between "PAS" and "parental alienation" are subtle and not clearly established.⁷⁰ It is clear that parental alienation still "necessarily draw[s] on PAS theory and scholarship."⁷¹ The "father's rights movement" has taken on PAS and parental alienation as its own, and done an effective job—through advocacy, media campaigns, and publications—promoting these theories to the public and the court.⁷²

For a victim of domestic violence, this means that judges tend to be receptive to fathers' pleas to be involved and are not inclined to give victims of violence sole legal custody without a specific finding of family violence.⁷³ To obtain such a finding, however, mothers must either obtain a civil protection order such that a judge acknowledges the violence, or testify to the violence on record and have the judge make a finding of credibility.⁷⁴ Judges see many mothers seeking child support against "dead-beat dads." In other words, judges may grow accustomed to seeing fathers who are not involved. Seeing fathers who actively engage in the legal process so as to be a part of their children's lives may impress certain judges.

Asserting independence and acknowledging violence in a public forum may put battered mothers in even more danger.⁷⁵ Battered mothers are often left with a choice between two evils: accepting shared legal custody with their batterers, which requires communication; or, talking about the

66. *Id.*

67. *See id.* at 236.

68. *See id.* at 246.

69. *See id.*

70. *See id.*

71. *Id.*

72. *See id.* at 244.

73. *See id.* at 244-45.

74. *See, e.g.,* Clements v. Haskovec, 251 S.W.3d 79, 83 (Tex. App. 2008) (making a finding of family violence after hearing testimony and holding that previous actions met the statutory definition and that violence may occur in the future).

75. *See, e.g.,* State v. Mechling, 633 S.E.2d 311, 324 (W.Va. 2006) (calling the fear of retaliation by the defendant a "reasonable projection of past conduct").

abuse in a public forum, which puts them at risk of retributive violence from their batterers. Stripping parents of all visitation rights is extremely uncommon. Except in the rare cases where a judge makes specific findings that visitation will likely hurt the child's physical and or mental/emotional health and/or impede on the child's emotional development will the court prevent any and all visitation from occurring.⁷⁶ A judge may decide to prevent visitation in a case where there is a finding or pending investigation of sexual assault on the child in question by the parent in question. Family courts are very hesitant to prohibit any contact between children and their biological parents.

Allowing visitation, even if it is supervised or facilitated by a neutral third party, requires communication between victim and batterer.⁷⁷ There is involvement through the child, control through court orders, and continued involvement until the family court order expires, either at the child's eighteenth birthday or when the child turns twenty-one (depending on the state).

"FAILURE TO PROTECT" AS A PROBLEMATIC DOCTRINE

"Failure to protect" laws that allow for intervention by the juvenile court based on exposure to domestic violence assume intimate partner violence harms children.⁷⁸ This assumption often necessitates state or judicial intervention on behalf of the children. There are many examples in which "failure to protect" allegations are applied correctly, where removal is the judgment that best serves the child's interests.⁷⁹ That said, definitive data does not exist on whether and when removal is in fact more detrimental to a child's interests than continued exposure to intimate partner violence.⁸⁰

In the past twenty years, much research has been completed and data compiled about the negative impacts of exposure to domestic violence on children's psychological and physical well-being.⁸¹ "Exposed children may develop a range of social, emotional, and academic problems including aggressive conduct, anxiety symptoms, emotional withdrawal,

76. Cf. MODEL CODE ON DOMESTIC & FAMILY VIOLENCE § 402 cmt. (Nat'l Council of Juv. & Fam. Ct. Judges 1994) (noting that the drafters of the model code chose to mandate consideration of the best interests of the child in custody cases involving domestic violence due to the historical failure by courts to give such matters due consideration).

77. See *id.* § 405 (listing ways in which a court can mitigate the effects of custody arrangements on domestic violence victims).

78. See Weithorn, *supra* note 33, at 26.

79. See *id.* at 36 n.140.

80. See *id.* at 26-27.

81. See *id.* at 4.

and serious difficulties in school.”⁸² Research also shows “that these children are more likely than are children from nonviolent homes to develop emotional and adjustment problems as adults, including repetition of the patterns of violence they observed as children.”⁸³

Others argue that not all children exposed to domestic violence are harmed by their exposure.⁸⁴ In this view, a great deal of government intervention in family situations is unnecessary.⁸⁵ According to this grouping of research, “a sizable proportion of children exposed to domestic violence do not appear to be harmed, and thus do not require state protection through intrusive intervention into the family.”⁸⁶ While it is clear that many children are in fact harmed by their exposure to violence in the home, it is still unclear to what extent. The question thus becomes one of determining which is worse—the exposure to domestic violence or the removal of children from their parents’ care?

The removal of children from their family homes is extremely detrimental, particularly for children of domestic violence victims.⁸⁷ “Removal of children from an abusive or neglectful home may seem an appropriate short-term strategy for protecting children.”⁸⁸ Studies show, however, “that there is a limited likelihood of reunification after removal, and that risks to children in foster care are substantial.”⁸⁹ Removal may do more harm than good.⁹⁰

[R]emoving the child from the non-abusive parent can have an extremely detrimental effect on the child. Children who have been exposed to domestic violence often view “their immediate universe as unpredictable and unsafe” and removal may be more traumatic for them than for other children. These children are at heightened risk for separation anxiety disorder and may experience self-blame and anxiety about the safety of their parent.⁹¹

Children who are removed from their non-abusive parent are placed at

82. *Id.* at 6.

83. *Id.*

84. *See id.* at 27 (arguing that government intervention may extend unnecessarily to children who are unharmed by exposure to domestic violence).

85. *See id.* at 31.

86. *Id.*

87. *See* Kathleen A. Copps, *The Good, the Bad and the Future of Nicholson v. Scoppetta: An Analysis of the Effects and Suggestions for Further Improvements*, 72 ALB. L. REV. 497, 502 (2009) (arguing that children exposed to domestic violence suffer more trauma from being separated from family than other children because they have a higher risk for separation related disorders).

88. Murphy, *supra* note 40, at 712.

89. *Id.*

90. *See* Copps, *supra* note 87, at 503.

91. *Id.* at 502.

risk simply by going into foster care.⁹² Children in foster care are at a seventy-five percent higher risk of child maltreatment, twice as likely to die from abuse, and four times as likely to be sexually abused.⁹³ Foster care children

are also more likely to have health problems and receive inadequate medical care, to have problems in school, and to have behavior and emotional problems. Children's lives are also further disrupted by removal because they are separated from their siblings, community, friends, and school. Also, for practical reasons, visitation may be difficult and the constraints of supervised visitation may inhibit normal interaction between parent and child.⁹⁴

PAST REFORMS

The federal government and states have taken steps to improve the situation, though many have been ultimately inadequate. The Social Security Act of 1935 established the Aid to Dependent Children program. This program increased the federal government's involvement in social welfare and "established the policy that it is better to provide financial aid to families in need than to remove children."⁹⁵ Subsequently in 1980, Congress passed the Adoption Assistance and Child Welfare Act. This Act required judges to determine whether the state has made "reasonable efforts" both to enable children to remain safely at home *before* placing them in foster care, and to reunite foster children with their biological parents.⁹⁶ However, this "reasonable efforts" standard is a low threshold and social workers can easily meet it.⁹⁷

In the landmark case of *Nicholson v. Scopetta*,⁹⁸ the New York courts dealt with the issue of charging battered mothers with neglect, or failing to protect their children. The decision held that showing that a child was exposed to domestic violence is insufficient to show neglect.⁹⁹

The "more" that is required of the petitioner is a showing, by a preponderance of the evidence, that (1) the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and (2) the actual or threatened impairment is

92. *See id.*

93. *See id.*

94. *Id.* at 502-03.

95. *Id.* at 499-500.

96. Murphy, *supra* note 40, at 705.

97. *See* Kathleen Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 324-27 (2005) (reviewing the history of the application of the "reasonable efforts" standard from federal legislation by state agencies).

98. 820 N.E.2d 840 (N.Y. 2004).

99. *See id.* at 844; *see also* Copps, *supra* note 87, at 507.

clearly attributable to the mother's failure to exercise a minimum degree of care toward the child. The use of the word "imminent" requires that the harm is "near or impending, not merely possible."

....

The court also found that there could be no blanket presumption in favor of removal because not every child is harmed by exposure to domestic violence and removal may do more harm than good. Each case is fact specific and the petitioner must provide "particularized evidence" to prove that removal is in the best interests of the child.¹⁰⁰

The holding also made specific findings regarding reunification: diligent efforts at reunification, by the Administration for Children's Services (ACS), must include services to help the parent "so as to render the parent capable of caring for the child."¹⁰¹

These services may include assistance with housing, employment, counseling, medical care, mental health counseling and psychiatric treatment.¹⁰² This is important because it shows that the New York courts are aware that providing services to the mother, and thus helping enable her to provide and care for her children, will ultimately benefit her children as well. The *Nicholson* case has also led to increased training of child welfare workers. "The preliminary injunction in *In re Nicholson* specifically required that a training program be implemented that informed all ACS employees of the requirements of the injunction."¹⁰³ "One of the most obvious, but also most important, benefits has been that ACS has been removing fewer children and charging fewer victims of domestic violence with neglect solely because of the exposure of their children to domestic violence."¹⁰⁴

The Greenbook initiative, a national evaluation born out of the publication *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice*, served as a guide for how communities could respond to and help families with co-existing child maltreatment or neglect and domestic violence.¹⁰⁵ The project provided a roadmap for ways that child welfare agencies, domestic violence service providers, and the juvenile courts could work together to collaborate and effectively respond to families in this situation.¹⁰⁶ In 2000,

100. Copps, *supra* note 87, at 507-08 (citing *Nicholson*, 820 N.E.2d at 844-47).

101. *Id.* at 512 (quoting *In re Marino S., Jr.*, 795 N.E.2d 21, 24-25 (N.Y. 2003)).

102. *Id.* (citing *Marino S., Jr.*, 795 N.E.2d at 25).

103. *Id.* (quoting *In re Nicholson*, 181 F. Supp. 2d 182, 192 (E.D.N.Y. 2002)).

104. *Id.* at 510.

105. Duren Banks et al., *Changing Policy and Practice in the Child Welfare System Through Collaborative Efforts to Identify and Respond Effectively to Family Violence*, 23 J. INTERPERSONAL VIOLENCE 903, 906 (2008).

106. *Id.*

six communities with differing needs and population breakdowns (El Paso County, CO; Grafton County, NH; Lane County, MO; San Francisco County, CA; St. Louis County, MO; and Santa Clara County, CA) received funding and other support from the U.S. Department of Justice and U.S. Department of Health and Human Services to implement the Greenbook recommendations over the course of a 5-year demonstration initiative.¹⁰⁷ System change in child welfare agencies was explored in three areas: “philosophical approach to co-occurrence, screening and assessment, and case planning and service array for adult victims of domestic violence and domestic violence perpetrators.”¹⁰⁸

The findings of the initiative were varied. Overall, “the sites engaged in structural changes to facilitate collaboration aimed at improving practices, services, and outcomes for children and families.” Although collaboration challenges persisted, “collaboration was identified as one of the successes of the Greenbook initiative.”¹⁰⁹ Through the Greenbook initiative, changes were made at all levels, including working directly with families with co-current domestic violence and child maltreatment and neglect. The different partner organizations contributed to this change in different ways. The extent and patterns of change varied among sites and systems and was affected by the larger context of practice.¹¹⁰ The national evaluation ended data collection activities in June 2006, but several sites continued Greenbook work using rollover funds from the original grants.¹¹¹

SUGGESTIONS FOR FUTURE REFORMS

While there is no easy solution for court-involved battered mothers, there are improvements that can be made to existing systems to alleviate potential confusion that mothers experience and improve their chances for success (meaning safety and unification with children).¹¹² Better ways exist to apply the “failure to protect” doctrine and to help battered mothers

107. THE GREENBOOK NAT’L EVALUATION TEAM, THE GREENBOOK INITIATIVE FINAL EVALUATION REPORT i (2008) [hereinafter GREENBOOK REPORT], available at <http://aspe.hhs.gov/hsp/08/sr/greenbook/report.pdf>.

108. Banks et al., *supra* note 105, at 911.

109. GREENBOOK REPORT, *supra* note 107, at iv.

110. Jeffrey L. Edleson & Neena M. Malik, *Collaborating for Family Safety: Results from the Greenbook Multisite Evaluation*, 23 J. INTERPERSONAL VIOLENCE 871, 873 (2008).

111. GREENBOOK REPORT, *supra* note 107, at 6.

112. See Pualani Enos, *Prosecuting Battered Mothers: State Laws’ Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN’S L.J. 229, 267-68 (1996) (suggesting the treatment of battered women’s interrelated problems through coordinated action between support systems such as the court, police, CPS and the medical community).

and their children stay together.¹¹³ First and foremost, judges, social workers, and their advocates need to understand why some women stay in violent homes.¹¹⁴ Some victims believe having both parents in the home is in the child's best interest, particularly if the abuser has not physically assaulted the children.¹¹⁵ "Children's pressure on the abused parent can be quite compelling, especially with those batterers capable of manipulating the children . . ."¹¹⁶ Before removing children from the homes, the court should first consider removal of the abusive parent or boyfriend rather than removal of the children.¹¹⁷

Battered mothers face significant barriers to leaving a violent situation.¹¹⁸ Judges, social workers, and lawyers must fully understand the hurdles battered mothers caught up in abuse and neglect proceedings face and the realities in which they mother.¹¹⁹ The majority of parents involved in child welfare proceedings are indigent.¹²⁰ "[T]he empirical data show that child abuse (and the child neglect commonly lumped in with it) are clearly associated with income level."¹²¹ Minority women are in need of special legal consideration, as women of color are disproportionately charged with many crimes, including "failure to protect."¹²² "[I]ndigent battered women often cannot make use of community resources that are contingent upon the access afforded by a car, a job with benefits, and affordable child and healthcare."¹²³ Looking at the intersection of domestic violence and poverty, feminists have long maintained that abuse of women is one form of social control that has sweeping and long lasting

113. See *id.* at 229-30 (proposing the replacement of a strict liability test with an objective test in cases where an abused mother is accused of failing to protect her child from the abuser).

114. See Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19 (1999) [hereinafter Buel, *Fifty Obstacles to Leaving*] (explaining that knowledge of why domestic violence victims stay is essential to stem the tide of abusive behavior).

115. See *id.* at 20.

116. *Id.*

117. See Copps, *supra* note 87, at 508.

118. See Buel, *Fifty Obstacles to Leaving*, *supra* note 114, at 19-26 (describing several reasons battered women fail to leave their abusers, including financial despair, isolation, cultural or family pressure, and lack of job skills).

119. See *id.* at 19-20 (recounting the financial struggles that prompt women to stay in abusive relationships).

120. Richard J. Gelles, *Poverty and Violence Toward Children*, 35 AM. BEHAVIORAL SCIENTIST 258, 263 (1992); see also Joy Duva & Sania Metzger, *Addressing Poverty as a Major Risk Factor in Child Neglect: Promising Policy and Practice*, 25 AM. HUMANE 63 (2010), available at http://www.judiciary.state.nj.us/conferences/2A-4/Protecting_Children_Article_on_Poverty_and_Neglect.pdf.

121. Gottlieb, *supra* note 27, at 382.

122. Buel, *Effective Assistance of Counsel*, *supra* note 21, at 236.

123. *Id.* at 242.

consequences.¹²⁴

For many domestic violence victims, seeking to escape violence, finding immediate temporary shelter and more permanent affordable housing must be identified immediately by counsel or a lay advocate, as these are some of the main reasons victims return to their abusers.¹²⁵ “[A]pproximately one-third of battered women lose their jobs as a direct result of abuse, and as many as 57.8% do not want to go to work because of threats of future abuse.”¹²⁶

Research reveals that experiencing domestic violence increases a mother’s feeling of responsibility in regard to her children.¹²⁷ Consequently, “women have to be resourceful and to develop a range of strategies in order to protect and care for their children.”¹²⁸ The ways in which women live with violence on a consistent basis and make decisions to protect their children from that violence defies the notion that battered mothers are defective parents.¹²⁹ “Domestic violence creates an environment deeply un-conducive to achieving even ‘good enough’ mothering. That so many women do resolve this impossible conundrum is testimony to their spirit, endurance and determination.”¹³⁰ Thus, it matters that so many battered mothers can parent and keep their children safe. Courts can aid or hinder that responsibility.

Women who are unable to stop the violence or leave their abusive partners risk losing their children to the foster care system.¹³¹ The practice of removing children from domestic violence victims has “been criticized for not taking into account the difficulties and threats women face when they go through domestic violence and when they attempt to leave their partners, and the intervention strategies therefore tend to be experienced as punitive and blaming rather than as supportive.”¹³² In addition, the practice of removing children from victims shifts the focus from men to women. “[T]he problem becomes defined in terms of women’s ‘failures’ as mothers rather than in terms of the father’s actions.”¹³³ Judges, social workers and lawyers must internalize this notion and evaluate and advocate on behalf of battered mothers in their unique context.

124. *Id.* at 243.

125. *Id.*

126. *Id.* at 242-44.

127. Lapierre, *supra* note 18, at 1442.

128. *Id.*

129. *Id.* at 1436.

130. *Id.*

131. *Id.* at 1437.

132. *Id.*

133. *Id.*

Equally if not more important is the potential for danger in leaving; women who leave their batterers are often at heightened risk of harm.¹³⁴ This escalation of violence at the time of separation has been coined "separation assault."¹³⁵ "Offering victims of domestic violence the remedy of seeking an order of protection further assumes that getting an order will make them safe—or at least, safer."¹³⁶ Research shows that a battered woman is 75 percent more likely to be murdered when she tries to escape or has escaped, than when she stays.¹³⁷ It is, therefore, dangerous for counsel, social workers, or the court to simply advise, or worse, to require, a victim to simply leave without ensuring that a trained advocate or attorney has worked with her to conduct extensive safety planning.¹³⁸

Battered women know their situations, their batterers, and those events and decisions that incite violence with their batterers. Leaving and obtaining a protective order are two actions that can, and often do, put a victim of violence in even more danger.¹³⁹ Requiring immediate separation and procurement of a protective order is potentially shortsighted and dangerous.

To think that men who are found to have physically, sexually, and/or psychologically abused their intimate partners (such a finding generally being the basis for the issuance of an order of protection in the first instance) will just "cease and desist" if ordered to do so by a court is simply unrealistic.¹⁴⁰

Judges and social workers need to understand the multiple factors at play that prevent a battered mother from leaving a battering relationship. The evaluation must then be based on the battered mother's parenting in the particularized context of her situation. "That abuse victims make many courageous efforts to flee the violence is too often overlooked in the process of judging them for *now* being with the batterer."¹⁴¹

Lawyers and scholars must recognize the continuum of agency and victim-hood; doing nothing or taking sufficient steps to protect oneself are not two discrete categories into which battered women can be

134. Aiken & Goldwasser, *supra* note 51, at 162.

135. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 6 (1991) (coining the term "separation assault" to identify assaults that block women from leaving).

136. *Id.*

137. Buel, *Fifty Obstacles to Leaving*, *supra* note 114, at 19.

138. See *id.* (asserting the need for safety planning to avoid separation assault).

139. See *id.* (noting the higher probability that a woman will be killed by her abuser if she tries to or does flee); Aiken & Goldwasser, *supra* note 51, at 153 n.87 (citing a study showing that protective orders give women a false sense of security, thereby increasing their danger).

140. Aiken & Goldwasser, *supra* note 51, at 152.

141. Buel, *Fifty Obstacles to Leaving*, *supra* note 114, at 19.

classified A victim's ability to engage in help-seeking behavior is constrained by myriad factors, many of which are beyond her control.¹⁴²

Social workers who may have had minimal specialized training in domestic violence make most of the decisions regarding initial removal.¹⁴³

"These workers make largely discretionary judgments about bad mothering and their underlying assumptions are, for the most part, unexamined and unchallenged. Conversations with workers reveal a deep bias about bad mothering based on race, class, and poverty."¹⁴⁴

Social workers and the courts often place unrealistic and reactionary expectations on women to either obtain a protective order or immediately separate. Not only are both expectations potentially impossible for women who are financially dependent on their abuser and may have little community support system—which is common after a relationship built on control and potential isolation—but they are dangerous and could have lasting, counterintuitive results. Social workers need more training and support in dealing with cases involving domestic violence.

Such training is critical both for making the right choices in these challenging cases and for noticing the domestic violence in the first place, because domestic violence often goes unnoticed by child welfare professionals. Research suggests that social workers are missing the mark with this population. "Using data from a nationally representative sample of families investigated for child maltreatment . . . found that 31% of female caregivers reported that they experienced domestic violence in the preceding year but that child welfare workers identified this violence in only 12% of all families who were investigated."¹⁴⁵

"Failure to protect" cases filed against battered mothers should have more than one social worker appointed to the case, to mandate that a battered mother receive supportive services, multiple opinions and diverse option creation from social workers to help a mother find safety. And, if removal is suggested, a domestic violence team from the state's child welfare agency should be appointed and a detailed plan for reunification must be drafted. Battered mothers must have a safe place to go, an effective way to communicate with their social workers, and frequent visits with their children if there is in fact temporary removal.

In addition, thwarting statutory expansion of child protection's reach in cases involving domestic violence may improve victim's help-seeking behaviors. Domestic violence advocates fear that such expansion of the reach of child protective services will further inhibit battered women from

142. Buel, *Effective Assistance of Counsel*, *supra* note 21, at 224-25.

143. Murphy, *supra* note 40, at 706-07.

144. *Id.* at 707.

145. Banks et al., *supra* note 105, at 905.

seeking help. For example, if workers at domestic violence shelters become mandated reporters of child maltreatment under state reporting statutes, battered women may become less willing to seek their help.¹⁴⁶ In some states, workers at domestic violence shelters are already mandated reporters.¹⁴⁷ The threat of an abuse and neglect report may dissuade battered mothers from taking the positive steps of reporting abuse by abusive partners, seeking medical care, or pursuing protection orders.¹⁴⁸

Battered mothers must also be appointed counsel with expertise in the dynamics of domestic violence. In venues such as abuse and neglect proceedings, where mothers receive appointed counsel if their income qualifies, those attorneys should understand the complexity of battering relationships and understand the interrelation between the systems. Further, these lawyers should be required to investigate whether their clients are or have been involved in other court systems, what happened in those cases, and whether their client is aware of what is happening. "That so many battered women defendants receive ineffective legal assistance ought to compel introspection and remedial action within the legal profession."¹⁴⁹

The implications for battered defendants of incompetent representation are disastrous.¹⁵⁰

The problem is characterized by attorneys' failure to present defense theories linked to the abuse endured by battered women defendants and is further compounded by judges who refuse to apply the law. A battered woman defendant's case outcome is not so much predicated on the specific facts of her situation as on whom she draws for judge and counsel, as well as her race and socioeconomic status.¹⁵¹

Traditional theories of representation and the lawyer-client relationship do not apply to battered mothers.¹⁵² A battered defendant may have a hard time talking about the level of abuse (physical and psychological) they have endured over the course of her relationship. Counsel, therefore, has an obligation to provide a safe counseling and interviewing space and to

146. Weithorn, *supra* note 33, at 26-27.

147. See, e.g., ARIZ. COAL. AGAINST DOMESTIC VIOLENCE, CONFIDENTIALITY FOR DOMESTIC VIOLENCE SERVICE PROVIDERS IN ARIZONA UNDER FEDERAL AND STATE LAW 18 (2003), http://www.delapointe.net/diannepost/docs/confidentiality_manual.pdf (noting that any domestic violence victim advocate who comes to reasonably believe, during the course of her employment, that a child is a victim of abuse must immediately report this information to a peace officer or Child Protective Services).

148. Murphy, *supra* note 40, at 722.

149. Buel, *Effective Assistance of Counsel*, *supra* note 21, at 217-18.

150. *Id.*

151. *Id.*

152. See *id.* at 226.

sensitively question her client about the extent and history of abuse.¹⁵³

“A battered defendant[,] who has often been denied even the right to speak by the abuser, needs her lawyer to accurately present her voice in court.”¹⁵⁴ Figuring out a battered client’s voice is not an easy job. Lawyers who do not have training in domestic violence or who are unable to show empathy may not be providing competent representation.¹⁵⁵ In fact, some argue that many prosecutors are more open to just case dispositions when the attorney has prepared an extensive review of the history of facts and violence and any mitigating circumstances surrounding the domestic violence victims’ commission of an offense.¹⁵⁶

Lawyers and judges must be able to understand that there are more than two options when it comes to battered mothers: staying and leaving.¹⁵⁷ “[D]oing nothing or taking sufficient steps to protect oneself are not two discrete categories into which battered women can be classified A victim’s ability to engage in help-seeking behavior is constrained by myriad factors, many of which are beyond her control.”¹⁵⁸

The short term costs of appointing more experienced counsel and educating judges about the complex dynamics of domestic violence are far less expensive than what the current system pays out. “The short term costs of this method are far greater than providing the needed services (foster care can cost upward of \$19,000 per child per year) and the long term costs are even worse.”¹⁵⁹ The high cost of foster care, coupled with poor outcomes for youth in placement such as higher rates of homelessness, criminal behavior, and poverty than those children who remained with their parents, supports this notion.

More broadly, society and the systems that exist therein must make it easier for battered women to safely leave their abusive partners. Thus, when the legal system does intervene, the actors will not ignore the fundamental bond that exists between mothers and their children, but will be able to provide real, safe options as opposed to removal.¹⁶⁰ In other words, the conversation must go beyond the divide of mothers’ rights vs. children’s rights, and see that one does not exist without the other.¹⁶¹

Several questions regarding the exchange of information remain when

153. *Id.* at 220.

154. *Id.* at 226.

155. *Id.* at 227.

156. *Id.* at 221.

157. *See id.* at 224-25.

158. *Id.*

159. Gottlieb, *supra* note 27, at 379.

160. *See* Murphy, *supra* note 40, at 762.

161. *Id.*

advancing the argument for systemic change. Is there a way to share information among the different court systems without violating a battered mother's confidentiality? Is there a way for cases to be "flagged" in a state system, so that when a child welfare case based on "failure to protect," based on exposure to domestic violence, is closed because of a mother's compliance and a father subsequently files a custody case in family court, that judge in the family court case is made aware of what could be a strategic move by a batterer?

In most jurisdictions in the United States, juvenile court records are closed to the public. To receive federal funding under the Child Abuse Prevention and Treatment Act (CAPTA), among other requirements, states must preserve the confidentiality of all child abuse and neglect reports, except in limited circumstances.¹⁶² Furthermore, all states have confidentiality provisions to protect abuse and neglect records from public scrutiny. Confidentiality provisions mandate that such records are confidential, and many include specific mechanisms for protecting them from public view.

There are, however, "damaging consequences of confidentiality laws."¹⁶³ Confidentiality laws frustrate easy communication between courts. Laws that prohibit public conversation of child welfare cases silence many powerful stories. The media and the public do not have open access to what actually happens to children and their parents in the child welfare and family court system.¹⁶⁴

Confidentiality laws prevent the procurement of statistics on how many battered mothers in every state in the United States are charged with "failure to protect." This data would be useful to compare and contrast with data available from family courts on how many of those same named parties—i.e. fathers—filed for custody in the family court once the child welfare case concluded. Further, family court judges would be given access to those juvenile court files that inevitably would provide a deeper history on the parties and parenting practices than a brief family court hearing.

Sharing information and allowing the public to see what is happening in the different court systems is an important first step to repair the current state of affairs. The current approach to domestic violence is focused on empowering individual victims by encouraging them to seek legal remedies.¹⁶⁵ This approach fails when the victims are multi-court involved

162. See 42 U.S.C. § 5106a(b)(2)(B)(viii)-(x) (2006).

163. Matthew I. Fraidin, *Stories Told and Untold: Confidentiality and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 2 (2010).

164. *Id.* at 3.

165. Aiken & Goldwasser, *supra* note 51, at 180.

mothers. For these women, domestic violence is more than an individual problem. Rather, it is a family problem and a community problem. Careful sharing of information between courts and with the public will help transform the court's approach to domestic violence from one that is limited and focused on individuals to one that is broader and more holistic.

Forcing the system actors to take responsibility and provide real options for battered mothers and allowing the public to access, opine, and advocate on behalf of this group that is currently silenced by confidentiality laws will help battered mothers in their fight for safety and fair access and intervention by the juvenile court, family court, and civil court in this country.